(21,313.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 517.

E. W. SIMMONS, LATE MASTER OF THE TUG "HELEN," AND OTHERS, APPELLANTS,

vs.

THE STEAMSHIP "JEFFERSON," THE OLD DOMINION STEAMSHIP COMPANY, CLAIMANT AND OWNER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1908.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the Court Room in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday in November, being the fourth day of the same month, in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among others were the following proceedings, to-wit:

In Admiralty. No. 1321.

E. W. SIMMONS ET ALS.
vs.
STEAMSHIP "JEFFERSON."

Libel.

Filed March 4th, 1907.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

The Libel of E. W. Simmons of said district, mariner and lately master of the tug "Helen," for himself and others interested as salvors, against the steamship "Jefferson," her tackle, apparel and furniture, whereof the Old Dominion Steamship Company is
2 or lately was owner, in the cause of salvage, civil and maritime, alleges and propounds as follows:

1. That in the afternoon of the twenty-fifth day of December, 1906, the tug "Helen" whereof said E. W. Simmons was Master, and having a crew of six men besides said Master, was, together with the tug "Alice," towing a certain barge from Norfolk, in said District, to the piers of the Chesapeake and Ohio Railway Company at Newport News, in said District; that about four or four-thirty o'clock on said day when said tugs had arrived almost at their destination at Newport News it was discovered that a fire was raging in the ship yard of the Newport News Ship Yard and Dry Dock Company, and thereupon the libellant, with the said tug "Helen" docked his tow at one of the said piers of the Chesapeake and Ohio Railway Company, and proceeded with all possible speed to the said fire:

2. That when libellant arrived at the said ship yard it was found that a large and fierce fire was raging therein and that said steamship "Jefferson," which had been undergoing repairs at the said Ship Yard, was locked in one of the dry docks out of which the water had been emptied, and was afire, her upper works being then in full

blaze and her hull smoking throughout nearly its whole length; that there was no one on board at the time and no one could have stayed aboard under the circumstances; that the water pipes intended for the use of the fire department were frozen up and there was no water available for their use, and that this, together with the fact that the "Jefferson" was in a peculiar and inaccessible situation being in a dry dock, rendered the fire engines and fire department totally unable to render any assistance whatsoever; under which circumstances said steamer would have been completely destroyed but for the
3 assistance rendered by libellant and other salvors hereinafter mentioned:

3. That thereupon libellant with his said tug "Helen" and crew lay at a bulkhead of one of the piers as close to the said dry dock as possible, and together with the tugs "Alice" and "James Smith, Jr." played streams of water from their fire hose upon said steamship "Jefferson," and continued so to do until the fire was completely extinguished; that libellant and other salvors were thus engaged from about four-thirty o'clock in the afternoon of said day until about eight-thirty o'clock at night, during all of which time libellant and said salvors rendered every possible assistance to said steamship, and during all of which time libellant and others entitled as salvors as aforesaid, underwent great suffering from smoke, flame and sparks, and endured great hardship from exposure to the wind and water in the bitter coldness of the weather, and libellant and other salvors incurred great danger from said smoke, flames and sparks, and from electric wires, falling poles, adjacent burning buildings, etc.

4. That the said steamship "Jefferson" is of great value; that the aforementioned efforts and services rendered by libellant and other salvors saved the said steamship from total and complete destruction; that libellant, by reason of the hardships necessarily incurred, and especially by reason of the nature and the great importance of the services rendered in saving said steamship, reasonably deserve to have, and therefore claim a commensurate reward for salvage therefor:

5. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court:

Wherefore the libellant prays that process in due form of law be allowed according to the course of the Courts of Admiralty
4 and this Honorable Court in a cause of admiralty and maritime jurisdiction, may issue against the said Steamship "Jefferson," her tackle, apparel and furniture, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree such a sum of money or proportion of the value of the said steamship "Jefferson," to be due to the libellant and others, salvors, as a compensation for the said salvage services as shall seem meet and reasonable, together with their costs and expenses in this behalf, and that the said steamship "Jefferson," her tackle, apparel and furniture may be condemned and sold to pay the same, and the libellant and said

salvors may have such other and further relief as in law and justice they may be entitled to receive.

E. W. SIMMONS.

THORP & BOWDEN, *Proctors.*

EASTERN DISTRICT OF VIRGINIA, *To wit:*

E. W. Simmons being duly sworn says that he is the libellant above named, that the foregoing libel is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to these matters he believes it to be true.

E. W. SIMMONS.

Subscribed and sworn to before me this 4th day of March, 1907.
[SEAL.] G. E. BOWDEN, *Clk.*

5 *Petition of Chas. H. Ashberry, Master, et als.*

Filed March 12th, 1907.

To the Hon. Edmund Waddill, Jr., Judge of the District Court of the United States, for the Eastern District of Virginia:

The libel and petition of Chas. H. Ashberry, Pilot, Acting Master, S. Hampton, Engineer, seaman, C. B. Goodman, Cook, seaman, Ed. Knight, seaman, John Dunning, seaman, Warren McMurren, Cook, seaman, all being the crew of the tug "James Smith, Jr.," James Rope, Pilot, Acting Master, W. B. Gray, Engineer, seaman, Roland B. McCoy, seaman, Willie O'Connor, seaman, G. D. Thomas, seaman, Wm. Christmas, Steward, seaman, all being the crew of the tug "Alice," and James H. Benthall, Engineer, H. S. Treakle, seaman, J. F. Whitehurst, seaman, W. M. White, seaman, Henry Felton, seaman, and E. C. Smith, Cook, seaman, all being of the crew of the tug "Helen," intervening as salvors for their respective interest in the above entitled cause, alleges and propounds as follows:

1. That in the afternoon of the 25th day of December, 1906, as alleged in the libel of E. W. Simmons, heretofore filed herein, a fire was discovered in the Newport News Ship Yard; that the tug "Alice," with the crew above named, was the first to arrive, and by sounding her whistle proceeded to summon the assistance of other tugs in the vicinity; that within a few minutes after her arrival at the said fire, the said tugs "Helen" and "James Smith, Jr." arrived:

2. That the said steamship "Jefferson" was found to be locked in one of the dry docks in the said ship yard of the Newport News Ship Yard & Dry Dock Co., and was then afire and burning fiercely and was in an utterly helpless condition and had no one whatever aboard;

6 that the fire department of the said Ship Yard Company and of the City of Newport News, on account of their attention being required by burning buildings in the vicinity, and on account of frozen water pipes, etc., appeared to be unable, and did not render any assistance whatever to the said steamship "Jefferson."

3. That thereupon the tugs aforesaid, viz: "Alice," "James Smith,

Jr." and "Helen," together with the crews as hereinabove stated, E. W. Simmons, being master of tug "Helen" as alleged by him, lay at one of the bulkheads as close to said dry dock as possible, and by means of their fire hose, after several hours of dangerous and difficult work on the part of the crews aforesaid, succeeded in extinguishing the said fire on said steamship "Jefferson," and saved her from complete and absolute destruction; that said salvors were engaged in their efforts to save said steamship from about four-thirty o'clock in the afternoon until about eight-thirty o'clock at night, during all of which time and during the rendering of all of which services said salvors suffered great hardships from exposure to water, wind and weather, and incurred great risk and danger from electric wires, falling poles, smoke, sparks, falling walls, etc.; during all of which time said tugs were in comparatively no danger whatever;

4. That said Steamship "Jefferson" is of great value, having cost, your petitioners are informed, $400,000 or more; that the aforementioned efforts and services rendered by the said salvors alone saved he said steamship from complete destruction by fire, and therefore aid salvors by reason of the hardships and danger necessarily incurred and especially by reason of the value and great importance of the services rendered in saving said steamship reasonably deserve to have and therefore claim a commensurate and proportionate reward for salvage:

7 5. That although a reasonable time has elapsed since the rendering of said services, no reward or recompense has been received by any of your petitioners, the said salvors:

6. That the said steamship "Jefferson" is now within the Eastern District of Virginia, and within the jurisdiction of this Court:

7. That your petitioners, the salvors aforesaid, are all residents of the said Eastern District of Virginia:

8. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court:

Wherefore your petitioners, the said salvors, pray that process in due form of law may be issued against the said steamship "Jefferson," her tackle, apparel and furniture; that all persons having or pretending to have any right, title or interest therein, may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court would be pleased to decree such a sum of money or proportion of the value of the said Steamship "Jefferson" to be due to the said salvors as a compensation for the said salvage services rendered as shall seem meet and reasonable; that a just and proper portion thereof be distributed and granted to each of the said salvors, together with their respective costs and expenses in this behalf; and that the said steamship "Jefferson," her tackle, apparel and furniture may be condemned and sold to pay the same, and that your petitioners, the said salvors, may have such other and further relief as in law and justice they may be entitled to receive.

CHARLES H. ASHBERRY.

THORP & BOWDEN, *Proctors.*

8 EASTERN DISTRICT OF VIRGINIA, *To wit:*

Chas. H. Ashberry being duly sworn says that he is one of the libellants or petitioners above named, that the foregoing libel is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to these matters he believes it to be true.

CHARLES H. ASHBERRY.

Subscribed and sworn to before me this 12th day of March, 1907.

W. B. WALKER, *D'y Clerk.*

9 *Exceptions to Libel.*

Filed March 22, 1907.

The Old Dominion Steamship Company, appearing specially by Loyall, Taylor & White, its proctors, excepts to the libel of E. W. Simmons, late Master of the tug "Helen" and the petition of Chas. H. Ashberry, and of all others intervening as salvors in this cause, upon the following grounds:

First. In that the property proceeded against was not at sea or on the coast of the sea or within public navigable waters or on the shores thereof.

Second. In that the property proceeded against was not a vessel engaged in maritime commerce.

Third. In that the libellants did not render any service at sea or in saving property from any peril of the sea.

Fourth. In that there is not shown any sea peril or such peril as may be the basis of a claim for salvage.

Fifth. In that the "Jefferson" while in a dry dock from which all the water had been emptied when threatened with fire from land, was not a subject of salvage services.

Sixth. In that there is not shown any admiralty or maritime lien upon the "Jefferson" in favor of the libellants for salvage.

In all of which particulars the said libel and petition are imperfect and insufficient, and therefore, the said exceptor is not bound to answer the same, and it prays that the said libel and petition may be dismissed with costs.

LOYALL, TAYLOR & WHITE,
Proctors for the Old Dominion Steamship Company, Owner of the "Jefferson."

H. PUTNAM, *Advocate.*

10 *Opinion of the Court.*

Filed January 14th, 1908.

The "JEFFERSON."

Libel to Recover Salvage.

Thorp & Bowden for libellants; H. Putnam, and Loyall, Taylor & White, for respondents.

WADDILL, *District Judge:*

The libel in this case was filed by E. A. Simmons, late master of the steam tug "Helen," in behalf of himself and others interested as salvors," against the steamship "Jefferson," one of the Old Dominion Steamship Company's vessels, plying between the cities of Norfolk, Virginia, and New York, to recover for salvage services rendered in aiding to extinguish a fire on said steamship while in the dry dock of the Newport News Shipbuilding and Dry Dock Company, at Newport News, Va.

The cause is now before the Court on exceptions to the libel taken by the owners of the Jefferson, which present for determination the question of whether or not the Jefferson while thus in dry dock, is subject to a claim for salvage.

The precise point in issue seems not to have been decided before,—certainly no case has been brought to the attention of the Court specifically passing thereon, though the cases of Cope *v.* Vallette Dry Dock Co., 118 U. S. 625, and The Warfield, 120 Fed. 847, bear strongly upon the subject. In the first named case, the Supreme Court held that a dry dock permanently attached to the shore, and not intended for navigation, was itself not a subject of salvage service, and in the latter, Judge Thomas, of the Eastern District of
11 New York, decided that a vessel undergoing repairs in a dry dock, was not the subject of a maritime lien for an injury sustained while therein, by a person falling through one of her hatches.

The correct determination of this case must depend more upon the proper consideration of the general principles of maritime law applicable to salvage awards, than upon decisions definitely controlling the same. The elements of a salvage claim may well be taken into account in this connection, including the kinds of property against which it can be asserted, together with the character of service, and where the same may be performed.

Salvage is not based upon the mere right of compensation for work done and labor performed, but upon public considerations affecting the interests of commerce, the advancement and safety of navigation, and the security of lives and protection of property of those engaged in the hazardous service. In arriving at the amount of such an award, the courts especially take into account the risks involved to the salvors, the enterprise, labor and skill displayed, the value of the property salved, the extent of the danger from which it was saved,

and also the value of the prope[illegible] and apparatus used in the expedition. These, however, have relations to perils encountered and services rendered and performed to vessels actually engaged in commerce, either on the high seas, or other public navigable waters. The ship's business, the character of peril, and its locality, one and all are important considerations.

The Jefferson at the time of the service sued for, was not a medium of commerce subject to dangers and hazards of the seas. She, on the contrary, was in an unseaworthy condition, undergoing repairs. She could not move of her own volition, nor could she be used at the time in furtherance of commerce. She was neither pur-
12 suing, or capable of engaging in her ordinary business of navigation of the seas. In the [illegible]wick Hudson, 3 Benj. 419, Fed. cas. 6355, the Court says: "The fact that the structure has the shape of a vessel, or had been once used as a vessel, or can by proper appliances be again used as such, cannot affect the question. The test is the actual status of the structure as being fairly engaged in commerce or navigation." In the Warfield, 120 Fed. 847, *supra*, Judge Thomas said: "In her position, on the dry dock, she was not only out of commission, and withdrawn from navigation, but also incapable of navigation." Nor can it be said that the libellants rendered their services in saving the Jefferson from a peril of the sea, which is manifestly the character of loss for which a salvage award is made. Hughes Admr. 129; The Charlotte, 3 W. Rob. 68. The libel avers in substance that while the Jefferson was on fire, and in a dry dock from which all the water had been withdrawn, the "Helen" hurried to the scene, and while lying at the bulkhead of one of the piers, and as close to the dry dock as possible, she along with other tugs, played streams of water from their fire hose upon said steamship "Jefferson" and continued so to do until the fire was completely extinguished, and that "during all of which time libellant and said salvors rendered every possible assistance to said steamship, and during all of which time libellant and others entitled as salvors aforesaid, underwent great suffering from smoke, flame and sparks, and endured great hardship from exposure to the wind and water in the bitter coldness of the weather, and libellant and other salvors incurred great danger from said smoke, flames and sparks, and from electric wires, falling poles, adjacent burning buildings, &c." This language makes it clear that the peril in which the Jefferson was placed arose from a fire on the shore, and that there was no peril in connection with the sea, or the navigation thereof, other than that the libellants by
13 means of the fire hose of their tug played the water from the harbor on the fire, with a view of extinguishing the same. In Benedict's Adm. (3rd Ed.) sec. 300, this definition of salvage is given: "The right to salvage depends solely upon the consideration that the property has been saved to the owners from maritime peril by the salvor." In the case of the "Emulous," 1 Sumner, 297, Fed. Cas. 4480, Story, J. said: "I take it to be very clear that whenever the service has been rendered in saving property on the sea or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service." And Chancellor Kent in

his Commentaries, vol. 3, p. 245, says that salvage is "Founded on the principle of rewarding individual spontaneous and meritorious services rendered in the protection of the lives and property of others on the sea or wrecked on the coast of the sea." Judge Marvin in his valuable work on Wrecks and Salvage, page 104, sec. 97 (Ed. 1858) says: "Salvage is a compensation for maritime services rendered in saving property or rescuing it from impending peril, on the sea, or wrecked on the coast of the sea, or on a public navigable river or lake, where interstate or foreign commerce is carried on."

The locality of the peril may also be said to be important in the determination of the liability for an award for salvage in a case like this. In Abbott's Law of Merchant Shipping, 12 Ed. p. 539, it is said: "Before the Acts of Parliament presently mentioned, if the salvage were performed at sea or between high and low water mark, the court of admiralty had an original jurisdiction over the subject, and would fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit, or if a sale was necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason." See also Ency. of Laws of England, vol. 11, p. 368, Benedict's Adm. sec. 111, 3rd
14 Ed. In Kennedy's Civil Salvage, p. 2, Ed. 1891, the perils for which an award for salvage under the modern English practice may be made is thus limited: "When in danger, either at sea, or on the shores of the sea, or in tidal waters, or on the shores of tidal waters." In *Ex parte* Easton, 95 U. S. 68, the Supreme Court thus declares the sources of admiralty jurisdiction: "Admiralty and maritime jurisdiction is conferred by the constitution, and Judge Story, says it embraces two great classes of cases,—one dependent upon locality, and the other upon the nature of the contract." In Fifty Thousand ft. of timber, 2 Low, 64, Fed. Cas. 4783, Judge Lowell says: "A suit for salvage is neither contract nor tort. It resembles the latter, it being a proceeding for unliquidated damages, and in depending on locality.

The conclusion of the Court is that the word "Salvage" as used in maritime law, contemplates services rendered in connection with perils of the sea, and to vessels and other craft and instrumentalities in use in the navigation of the sea, as distinguished from those arising from ordinary casualty, such as fire or other damage to property on land, not itself subject to admiralty jurisdiction. The mere fact that the property upon which the fire was extinguished was that of a vessel, will not suffice; there must have been a sea peril from which it was rescued, and the vessel itself must have been at the time the subject of a sea peril, in order to support a maritime lien and afford jurisdiction *in rem* in the admiralty. The principles upon which salvage is awarded, the beneficiaries of such allowances, and the kinds of property subject to such claims, entirely exclude the idea of extending that doctrine to services of any kind, however meritorious,
arising from causes originating upon the land, or to property
15 on the land, not cast thereon from a wreck on the sea. The claim for salvage services growing out of a collision with a dry dock in Cope *v.* Vallette Dry Dock Co. 119 U. S., *supra,* was

denied, and it would seem to follow that if the dock itself was not the legitimate subject of the admiralty, that a vessel therein, out of the water, withdrawn for the time being from the designs and purposes of commerce, would not be the object of a maritime lien, and afford jurisdiction, for a maritime claim such as an award for salvage. Counsel for the libellants cite the "Robert W. Parsons," 191 U. S. 17, and earnestly insist that under the language used by Mr. Justice Brown in that case, at pp. 33 and 34, in which he says that repairs made on a vessel in a dry dock are not necessarily to be deemed as made — the land, they are entitled to maintain this case. Whatever force there may be in the position of counsel, it can hardly be said that the ruling in that case would be in any sense conclusive of the one under consideration here. That was not a case of salvage, but one arising out of contract for supplies furnished a domestic vessel, and for which a lien was claimed under the laws of the state, and enforced in the admiralty. The claim in such case was in no sense dependent upon locality, but was one of a maritime character, and the statutory lien for which was enforcible alone in the courts of the United States. The Glide, 167 U. S. 606. The case of the Plymouth, 3 Wall, 20, 33, 34, will be found to be of special interest in connection with the subject under consideration. That was a case of tort arising by reason of the negligence of the master and crew of a vessel allowing fire to spread from their ship to property on shore, and burning the same. The Supreme Court held that such loss was not the subject of an admiralty jurisdiction; that the damage sued for was sustained wholly upon the land, and that the fact that
16 the cause of the damage originated on water subject to admiralty jurisdiction, did not make the case one for the admiralty, and after emphasizing the fact that the jurisdiction of the admiralty over maritime torts depended upon locality, Mr. Justice Nelson discussed mixed cases where the cause of action arose partly on land and partly on water, and demonstrated conclusively that cases like the Robert W. Parsons, *supra*, for supplies furnished a ship, belonged to the class not dependent upon locality, but was controlled by the contractual relations of the parties.

Libellants also cite sundry cases in which salvage has been awarded for services in connection with saving vessels from burning piers or docks. These cases, however, turn upon entirely different considerations from the one in hand, as do also cases having relation to the saving of wrecked property on the sea or the shore of the sea.

It follows from what has been said that the libellants upon the facts and circumstances of this case, are not entitled to assert a salvage claim, and that this court is therefore without jurisdiction to entertain this libel for such service, and the same should be dismissed, and a proper decree to that end will be entered.

17 *Final Decree.*

Entered January 29th, 1908.

This cause came on to be heard upon the libel of E. W. Simmons, on behalf of himself and others and the petition of Chas. H. Ashbury and others and the exceptions to the libel and petition, and having been argued by the proctors for the respective parties and due deliberation had in the premises, the Court is of opinion for reasons stated in its opinion filed the 14th day of January, 1908, that it is without jurisdiction in the premises and that the exceptions should be sustained and the libel dismissed;

It is therefore ordered, adjudged and decreed by the Court, that the libel and petition herein be and the same are hereby dismissed.

It is further ordered, adjudged and decreed that the claimant recover its costs herein taxed.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

Dated the 29th day of January, 1908.

18 *Petition for Appeal.*

Filed July 15th, 1908.

The said libelants, conceiving themselves aggrieved by the decree made and entered on the 29th day of January, 1908 in the above entitled cause do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

THORP & BOWDEN,
Proctors for the Libelants.

Dated this 15th day of July, 1908.

Assignment of Errors.

Filed July 15th, 1908.

The libelants pray an appeal from the final decree of this Court in this cause to the Supreme Court of the United States and assign for error:

1. The Court erred in holding that it was without jurisdiction in the premises and that the exceptions should be sustained and the libel dismissed.

Wherefore the plaintiffs pray that the decree of the said District Court be reversed.

THORP & BOWDEN,
Proctors for the Libelants.

19 *Order Allowing Appeal.*

Entered July 15th, 1908.

The foregoing claim of appeal is allowed as prayed for from the final order and decree dismissing said suit for want of jurisdiction. It appearing to the Court that stipulation has been entered into by the libelants conditioned for appeal in the usual and proper form, no further bond is required.

EDMUND WADDILL, JR.,
United States District Judge.

Norfolk, Va., July 15, 1908.

20 *Agreement as to Record.*

Filed August 6th, 1908.

It is hereby stipulated by and between the proctors for the libellants and respondents respectively that the record in this cause shall consist only of the following:

The libel of E. W. Simmons.
The petition of Chas. H. Ashberry and others.
Exceptions of respondent.
Opinion of the Court.
Final decree.
Petition for appeal and assignment of errors.
Order allowing appeal.
Agreement as to record.
Citation.

E. W. SIMMONS, *Master,*
By THORP & BOWDEN, *Proctors.*
OLD DOMINION STEAMSHIP COMPANY,
Owners S. S. Jefferson,
By LOYALL, TAYLOR & WHITE.

21 *Citation.*

Filed July 15th, 1908.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Old Dominion Steamship Company, Claimant and Owner of the Steamship Jefferson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., within thirty days from the date of this writ, pursuant to an appeal duly allowed by the United States District Court for the Eastern District of Virginia, and filed in the Clerk's Office of the said Court

on the 15th day of July, A. D. 1908, in a cause wherein E. W. Simmons, late master of the Tug Helen, and others, are appellants, and you are appellee, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, at Norfolk, this 15th day of July, A. D. 1908.

EDMUND WADDILL, JR.,
United States District Judge for the Eastern District of Virginia.

Service of a copy of this citation is hereby admitted this 5th day of August, 1908.

LOYALL, TAYLOR & WHITE,
Proctors for Appellee.

22 *Order to Transmit Record.*

Thereupon, it is ordered by the Court that a transcript of the record and proceedings in the foregoing cause, with all things thereunto relating, as stipulated by counsel, be transmitted to the Supreme Court of the United States, to be held at Washington.

And the same is transmitted accordingly.

Teste:

JOSEPH P. BRADY, *Clerk,*
By D. ARTHUR KELSEY,
Deputy Clerk.

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of Virginia, To wit:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true record of the proceedings and judgment of the said Court, as stipulated by counsel, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and the seal of the said Court, at Norfolk, aforesaid, this 7th day of August, 1908.

[Seal U. S. District Court, Eastern Dist. of Virginia. Equity.]

JOSEPH P. BRADY, *Clerk,*
By D. ARTHUR KELSEY,
Deputy Clerk.

Costs of Appeal as follows:

Costs of Court	$49.95
Cost of transcript	9.35
Total	$59.30

Paid by Appellant.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Old Dominion Steamship Company, claimant and owner of the Steamship Jefferson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington, D. C., within thirty days from the date of this writ, pursuant to an appeal duly allowed by the United States District Court for the Eastern District of Virginia, and filed in the Clerk's Office of the said Court on the 15th day of July, A. D. 1908, in a cause wherein E. W. Simmons, late master of the Tug Helen, and others, are appellants, and you are appellees, to show cause, if any, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia, at Norfolk, this 15th day of July, A. D. 1908.

EDMUND WADDILL, JR.,
United States District Judge for the Eastern District of Virginia.

Service of a copy of this citation is hereby admitted, this 5th day of August 1908.

LOYALL, TAYLOR & WHITE,
Proctors for Appellee.

24 [Endorsed:] District Court of the U. S., Eastern District of Virginia. E. W. Simmons, Master, etc. *vs.* Steamship Jefferson. Citation. Filed July 15th 1908. D. A. Kelsey, D. Clk. Jos. P. Brady, Clerk United States Courts, Norfolk, Va.

Endorsed on cover: File No. 21,313. E. Virginia D. C. U. S. Term No. 517. E. W. Simmons, late master of the tug "Helen," and others, appellants, *vs.* The Steamship "Jefferson," The Old Dominion Steamship Company, claimant and owner. Filed August 21st, 1908. File No. 21,313.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908. No. 517.

E. W. SIMMONS, late Master of the Tug HELEN, and others,
Appellants,

vs.

The Steamship JEFFERSON, THE OLD DOMINION STEAMSHIP COMPANY, Claimant and Owner,
Appellee.

The Old Dominion Steamship Company, owner and claimant of the steamship *Jefferson*, appellee, moves this Honorable Court to dismiss this appeal as not properly here, and, therefore, not within the jurisdiction of this Court, because the jurisdiction of the Court below was not in issue within the terms of Section 5 of the Act of March 3, 1891 (26 Stat., p. 826), and also that no such question has been certified by the Court below to this Court.

In conformity with Rule 32 of this Court a motion to advance this cause on the docket of this Court was submitted on October 13th, 1908, and said motion was granted on October 19th, 1908.

BRIEF FOR THE OLD DOMINION STEAMSHIP COMPANY.

This is an appeal taken direct to this Court from the decree of the United States District Court for the Eastern District of Virginia.

The appellants were libellants in the lower Court and filed their libel and intervening petition against the steamship *Jefferson* to recover for alleged salvage services to said steamship while she was on fire in a dry-dock, from which all the water had been withdrawn, at Newport News, Va., December 25th, 1906.

(Libel and petition, Record, pp. 1-5.)

The Old Dominion Steamship Company, owner and claimant of the *Jefferson*, filed exceptions to the libel (Record, p. 5) and the cause duly came on to be heard before the Hon. Edmund Waddill, Jr., District Judge, who, on January 14th, 1908, dismissed the libel, holding that the libellants were not entitled to a salvage claim and the District Court was without jurisdiction (Opinion, Record, pp. 6-9. Reported, 158 F. R., 358).

From the final decree, entered January 29th, 1908 (Record, p. 10), the libellants appealed direct to this Court (Petition for appeal, Record, p. 10) and filed an assignment of errors (Record, p. 10).

The appeal was allowed by the District Judge (Record, p. 11), but the question at issue was not certified by the Court below to this Court.

POINTS.

I.—THIS COURT IS WITHOUT JURISDICTION AS THE APPEAL SHOULD HAVE BEEN TAKEN TO THE CIRCUIT COURT OF APPEALS.

Section 5 of the Judiciary Act of March 3d, 1891, is as follows:

"That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases.

In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

26 Stat., 826.

A. The question of jurisdiction.

The question of jurisdiction was not certified to this Court from the Court below, and there was no certificate, as will be seen from the record.

It is not contended on the part of the appellee that the District Court had no power to act on the *res*, which was within the District, or over the parties who were before it. That it had jurisdiction over the subject of salvage is, of course, unquestioned.

The Court below held that the libellants had failed to make out a case of salvage, or, in other words, a case properly cognizable in a Court of Admiralty.

Judge Waddill said:

"It follows from what has been said, that the libellants upon the facts and circumstances of this case are not entitled to assert a salvage claim, and that this court is therefore without jurisdiction to entertain this libel for such service."

158 F. R., 362.

A leading text writer thus states the distinction:

"The meaning of this clause has frequently been misunderstood. It is necessary to distinguish between power to take jurisdiction and its exercise; between power in the court under admitted facts, and whether certain facts create a case within the admitted powers."

Rose, Code of Federal Procedure, p. 246.

In World's Columbian Exposition Case, 56 Fed. Rep., 666, cited in Smith *v.* McKay, 161 U. S., at page 358, the Court said:

"We do not understand that the power of the Circuit Court to hear and determine the case was denied, but that the appellants contended that the United States had not by their bill made a case properly cognizable in a court of equity. The objection was the want of equity, and not the want of power. The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act."

"We regard this as a sound exposition of the law, and, applied to the case now in hand, it demands a dismissal of the appeal, on the ground that the objection was not to the want of power in the Circuit Court to entertain the suit, but to the want of equity in the complainants' bill. The appellants' contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity, in which the defendant should choose to file a demurrer to the bill on the ground that there was a remedy at law."

In Louisville Trust Co. *vs.* Knott, 191 U. S., 225, the headnote is:

"The question of jurisdiction which the Judiciary Act of May 3, 1891, C. 517, 26 Stat., 826, permits to be certified directly to this Court must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between themselves."

* * * "In principle the judgment in *Smith* v. *McKay* embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all Courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that Court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this Court from a Circuit Court."

Id., p. 235.

"When the requisite citizenship of the parties appears, and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that Court attaches, and whether the Court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave

to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the Circuit Court of Appeals."

Smith *v.* McKay, 161 U. S., 358, 359.

"Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat., 826, 827, when an appeal or writ of error is taken from a District Court or a Circuit Court in which the jurisdiction of the Court alone is in issue, a certificate from the court below of the question of jurisdiction to be decided is an absolute prerequisite for the exercise of jurisdiction here; and, if it be wanting, this court cannot take jurisdiction."

Maynard *v.* Hecht, 151 U. S., 324.

In U. S. *v.* Jahn, 155 U. S., 109, the headnote is:

"Giving to the Act of March 3, 1891, 26 Stat., 826, c. 517, to establish Circuit Courts of Appeals, taken as a whole, a reasonable construction, it is held: (1) That if the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this Court."

"Appeals or writs of error may be taken directly from the Circuit Court to this Court in cases in which the jurisdiction of these courts is in issue, that is, their jurisdiction as Federal Courts, the question alone of jurisdiction being certified to this Court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States."

Smith *v.* McKay, 161 U. S., 355;
Blythe Company *v.* Blythe, 172 U. S., 644.

"The Circuit Court dismissed the bills on another ground, namely, that the judgments of the State courts could not be reviewed by that Court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit

Court was a Federal Court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts.

If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect."

Blythe *v.* Hinckley, 173 U. S., 506, 507.

If appellants urge that a jurisdictional question can be extracted from the petition of appeal, assignment of errors, or other papers filed, the answer is that the limitations in the Act of 1891 cannot thus be evaded. Such a point has been urged before. Chief Justice Fuller, delivering the judgment of this Court, said:

"But in any view the absence of the formal certificate cannot be helped out by resort to these papers. The inquiry is not whether we can ascertain the question sought to be presented, but whether we can exercise jurisdiction under the statute, which we cannot, if the certificate is an absolute prerequisite, as we hold it to be."

Maynard *v.* Hecht, 151 U. S., 324-328.
See also Schweer *v.* Brown, 195 U. S., 171.

B. The date of taking the appeal.

The District Court for the Eastern District of Virginia has two terms a year, beginning the first Monday in May and November, each term lasting until the beginning of the following term. The decree herein was entered in the District Court on January 29th, 1908, and the term expired May 3d, 1908.

The appeal was not taken and allowed until July 15th, 1908, or during the term following that in which the decree was entered.

Even had the certificate been granted at the time of taking the appeal, it would have been too late.

"Where the jurisdiction of the court below is in issue, and the case is certified here for decision, the certificate must be granted during the term at which the judgment or decree is entered." Colvin *v.* Jacksonville, 157 U. S. 368, 158 U. S. 456.

See also the *Bayonne*, 159 U. S., 687.

The appeal in this suit should have been taken to the Circuit Court of Appeals. The appellants, however, having elected to appeal direct to this Court and having failed to have the question of jurisdiction certified to this Court, are without remedy, and their appeal should be dismissed.

II.—THE DECISION OF THE DISTRICT COURT WAS CORRECT AND THE LIBEL WAS PROPERLY DISMISSED.

The exceptions raise an elementary point in the law of civil salvage.

Does the quenching a fire upon a ship locked within a closed dry-dock, out of which all water has been emptied, form a basis of salvage? The services were by members of the crews of steam-tugs.

The libel shows a fire upon land in a large shipyard, also that the service was by water conveyed through fire hose stretched from tugs lying in the river near the bulkhead at Newport News. No request is alleged. It is stated that the *Jefferson* had no one on board.

Libellants claim that by their efforts the fire on the *Jefferson* was extinguished and the vessel thereby saved.

The exceptions to the libel are on the grounds:

FIRST.—In that the property proceeded against was not at sea or on the coast of the sea or within public navigable waters or on the shores thereof.

SECOND.—In that the property proceeded against was not a vessel engaged in maritime commerce.

THIRD.—In that the libellants did not render any service at sea or in saving property from any peril of the sea.

FOURTH.—In that there is not shown any sea peril, or such peril as may be the basis of a claim for salvage.

FIFTH.—In that the *Jefferson*, while in a dry-dock from which all the water had been emptied, when threatened with fire from land, was not a subject of salvage services.

SIXTH.—In that there is not shown any admiralty or maritime lien upon the *Jefferson* in favor of the libellants for salvage.

A.—THE JEFFERSON WAS NEITHER AT SEA, NOR ON SHORE, NOR ENGAGED IN NAVIGATION.

She was undergoing repairs on a graving dock from which the water had been emptied.

A distinction is to be made between a floating or balance dock, which is a structure lifting a ship by its own buoyancy, and a graving dock, which is excavated from the land, out of which the water is pumped, and kept excluded by gates or caissons. The dock at Newport News is *not* described as a floating or balance dock, and it is to be inferred (which is the fact) that it is an excavated graving dock.

Even where the ship was on a floating dock the court held her removed from the admiralty jurisdiction for a tort occurring while thus withdrawn from her element.

Judge Thomas said:

"In her position on the dry-dock, she was not only out of commission and withdrawn from navigation, but also incapable of navigation."

The *Warfield*, 120 F. R., 847 (1903).

In the *Robert W. Parsons*, 191 U. S., 17, the repairs to a canal boat were made in a dry-dock. The contract was unquestionably maritime, but although an indebtedness arising from contract, and therefore *not* dependent on locality, the Court expressed the view that repairs so made were within the ad-

miralty jurisdiction. This Court, however, confined itself to the lien and right of action for repairs as docking, and work there done in a dry-dock which was stated to be the "largest and most important jurisdiction, in connection with repairs" (p. 34).

B.—THE JEFFERSON WAS NOT SAVED FROM SEA PERILS.

The peril of fire was a peril of the land, and not of the sea. It is described as having been discovered in the shipyard. It was a danger not originally connected with the ship, or its appurtenance, but occasioned by the usual spread of a fire along land structures.

The salvors' risks are described as those incurred on land.

The libel propounds:

"During the rendering of all of which services, said salvors suffered great hardships from exposure to water, wind and weather, and incurred great risks and danger from electric wires, falling of poles, smoke, sparks, falling walls, etc., during all of which time said tugs were in comparatively no danger whatever." Art. 3.

The gist of this averment is that the tugs (to which the salvors belonged) were in the river in no wise imperiled. That the real risk and display of galiantry was by the men who carried inland the lines of extended fire hose and played them about the dry-dock.

Such a fire inland, though spreading toward the docks did not make any *sea* peril.

"The phrase 'perils of the sea' covers all losses or damage which arise from the extraordinary action of the wind and sea and from inevitable accidents directly connected with navigation."

1 Parsons, Marine Ins., p. 544.

Thus where a vessel was in a graving dock being repaired—like the Jefferson—although water was

left in the bottom two or three feet in depth, she was treated as having been removed from the sea. While there she was blown over and bilged by the violence of wind and weather. It was held that this was not a loss by perils of the seas.

Phillips *vs.* Barber, 5 B. & Ald., 161.

It occasionally happens that two vessels are in the same drydock together. Suppose that, by the wind or breaking of the shores, they strike together. Could such an accidental contact be held a collision, which impressed either vessel with a maritime lien?

When a vessel is carried ashore and driven inland by an unusual storm, the dredging out a channel to bring her back to the sea is a rescue from sea perils and is consummated by refloating the ship.

Frame *v.* The *Ella*, 48 F. R., 569.

C.—THE PROPERTY SALVED MUST BE A VESSEL ENGAGED IN COMMERCE, OR THE CARGO OF A VESSEL.

The fact that a benefit is conferred on a ship does not create a maritime lien, unless at the time she be engaged in commerce.

Thus, there is no lien for wharfage during the winter when a ship is not engaged in commerce.

The *Murphy Tugs*, 28 F. R., 429.

Neither has a shipkeeper, on board a vessel while repairing, any lien, for the same reason.

The *Island City*, 1 Lowell, 375.

Even if a vessel take on board wheat as a cargo, under an agreement to hold it on storage, the contract was not maritime and created no lien.

The *Pulaski*, 33 F. R., 383.

Hence a vessel *voluntarily* dismantled, and put out of commission, and in such a condition as to be incapable of engaging in commerce, is not subject to maritime salvage.

In the *Hendrick Hudson*, 3 Ben., 419, Fed. Cases, 6355, the Court used this langage:

"The fact that the structure has the shape of a vessel, or had been once used as a vessel, or can by proper appliances be again used as such, cannot affect the question. The test is the actual *status* of the structure as being fairly engaged in commerce or navigation."

This was also a case of salvage claimed against a steamboat, but one which had been dismantled, and fitted up as a saloon and hotel.

D.—SALVAGE IS ONLY AWARDED FOR SAVING PROPERTY FROM SEA PERILS.

Chief Justice Marshall, discussing the peculiarity of this jurisdiction to award salvage, said:

"If the property of an invidual *on land* be exposed to the greatest peril and be saved by the voluntary exertions of any persons whatever, if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea, yet the claim for salvage could not perhaps be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea and a very ample reward will be bestowed in the courts of justice. If we search for the motives producing this apparent prodigality in rewarding services rendered at sea we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for those services (one very much exceeding the mere risk encounted and the labor employed in effecting them) is intended as an inducement to render them, which it is for the public interests, and for the general interests of humanity, to hold forth to those who navigate the ocean."

Mason *vs.* Ship *Blaireau*, 2 Cranch, 240, 266 (1804).

1.—Definitions of Salvage.

"The right to salvage depends solely upon the consideration that the property has been saved to the owners *from maritime peril* by the salvor."

Benedict's Admiralty, § 300 (3rd edn.).

In case of the *Emulous*, 1 Sumner, 207, Story, *J.*, said:

"I take it to be very clear that whenever the service has been rendered in saving property on the sea or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service."

F. C., 4480.

Chancellor Kent, in his commentaries, says that salvage is

" founded on the principle of rewarding individual spontaneous and meritorious services rendered in the protection of the lives and property of others *on the sea or wrecked on the coast of the sea.*"

3 Com., *245.

Likewise Judge Marvin, in his classic treatise on Wreck and Salvage, thus defines salvage:

" Salvage is a compensation for maritime services rendered in saving property or rescuing it from impending peril, *on the sea*, or wrecked on the coast of the sea or on a public navigable river or lake, where interstate or foreign commerce is carried on." § 97, page 104 (ed. 1858).

See also Desty, Shipping and Admiralty, § 303.

The Continental law observes the same distinction.

Thus a writer in an international journal says:

" The character common to salvage and assistance is the peril of the sea, where the ship may be. (Le caractère commun au sauvetage et à l'assistance est péril de mer où se trouve un navire.")

M. Benfante, Revue Int. du Droit maritime, vol. 5, page 568.

The German commercial code (Art. 740) requires as a condition of salvage, that the ship be in sea distress, "*in einer Seenoth*," which is defined as a peril peculiar to navigation.

Schaps, Das Deutsche Seerecht, pp. 701, 702.

The German law, indeed, is stricter than our own in excluding all claims for salvage, except in case of sea perils. Thus a vessel afloat, but within a closed dock or basin—though in danger from fire—is not subject to salvage.

In the words of a leading text writer:

"The danger the ship is in must be inherent to, or result from, the ship being a navigating body. It makes no difference where the event occurs—on the high seas, or in a river, or in port."

Sieveking, German Law Relating to the Carriage of Goods by Sea. Eng. trans., p. 145. [London, 1907.]

This is sustained by a decision of the Oberlandesgericht of Hamburg, on October 13, 1888, which rejected a claim for salvage where fire had broken out on the steamer *Merchant Prince*, engaged in discharging cargo alongside the quay, in the Kaiserhafen of Bremerhaven. This basin is an enclosed dock, artificially excavated, with access out to the river by locks opened during certain hours. The Court said:

"Even if a case could be supposed, in which a ship in such a basin could incur distress at sea, such a case is not under discussion here. Distress at sea can be assumed only if the danger arose from, or is increased by, navigation. The present case does not show that. In the present case, the vessel of the respondent is in danger of catching fire. A sea-going vessel, of course, may possibly be in danger of catching fire, especially when she is on the voyage. The same may be assumed when she rides at anchor in her moorings, or in the stream, surrounded by water on all sides. But this cannot be applied

to the present case, where the vessel is lying in an enclosed dock close to the land."

Hanseatische Gerichtszeitung, 1888, Part I, No. 120 (p. 276).

Burchard, in his treatise on Salvage and Assistance (Bergung und Hülfeleistung in Seenoth), Hannover, 1897, says:

"The meaning of distress at sea is the opposite of a situation of danger occurring on land, or on inland waters entirely surrounded by land.

If on land or in inland waters surrounded by land, a situation of danger occurs through elementary force, which cannot be overcome by those directly concerned, the State and its organs (at least, in settled, civilized regions) or private persons in the neighborhood, endeavor to subdue the peril, or diminish its effects. No special compensation is necessary, as a rule, in order to induce active aid; solidarity of interest, of itself, incites where help is necessary" (p. 29).

2.—Jurisdiction of the Courts of Admiralty.

The insistence *on locality* is found in the leading authorities.

In the twelfth edition of Abbott's Law of Merchant Shipping it is declared:

"Before the Acts of Parliament presently mentioned, if the salvage was *performed at sea or between high and low water mark*, the court of admiralty had an original jurisdiction over the subject, and would fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit, or, if a sale was necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason" (page 539).

Indeed the distinction of locality was carried so far in England that, before 1821, the English courts of Admiralty could not award salvage for services performed between high and low water mark.

Encyclopædia of Laws of England, Vol. 11, p. 368.

Benedict's Admiralty, § 111, 3d edn.

Justice Kennedy, in his Law of Civil Salvage, thus limits the perils as settled in modern English practice:

"When in danger, either at sea, or on the shore of the sea, or in tidal waters, or on the shore of tidal waters."

P. 2, 2d ed. 1907.

In England and in the United States the question of locality is more important on account of the peculiar jurisdiction of our courts of admiralty which alone have power to award salvage.

In *ex parte Easton*, 95 U. S., 68, the two sources of admiralty jurisdiction are thus declared:

"Admiralty and maritime jurisdiction is conferred by the Constitution, and Judge Story says it embraces two great classes of cases,—one dependent upon locality, and the other upon the nature of the contract.

Damage claims arising from acts and injuries done within the ebb and flow of the tide have always been considered as cognizable in the admiralty; and, since the decision in the case of *The Genesee Chief*, 12 How., 443, it is considered to be equally well settled that remedies for acts and injuries done on public navigable waters, not within the ebb and flow of the tide, may be enforced in the admiralty, as well as for those upon the high seas, and upon the coasts of the sea."

Salvage is held to fall under the former class, that are strictly dependent on locality.

In 1871, Judge John Lowell said:

"A suit for salvage is neither contract nor tort. It resembles the latter, in being a proceeding for unliquidated damages, and *in depending on locality.*"

Fifty thousand ft. of Timber, 2 Low., 64.

It is not however contended that the *test of locality* applied to salvage is the same as that which regulates the jurisdiction over maritime *torts*. Salvage has the added territorial element of shores and

coast—a jurisdiction derived from wrecks, as is hereafter discussed.

The test of salvage in admiralty is not the maritime character of the agency that may be the efficient cause from which the relief originates. One test is the *peril* threatening the property proceeded against, and from which it is rescued.

Unless this were a sea peril, there has been no salvage service, and therefore no maritime lien and no jurisdiction to proceed *in rem* in the admiralty.

It is settled that such a fire is no sea peril, even if it had started on a ship waterborne and engaged in commerce. When it spread to the land it would no longer be a peril of the sea.

The *Plymouth*, 3 Wall., 20.

Mr. Justice Davis there said:

"The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river and sending a rocket or torpedo into the city by means of which buildings were set on fire and destroyed. That would be a direct act of trespass; but quite as efficient a cause of damage as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it, yet the origin of the trespass is upon navigable waters which are within its cognizance."

Whatever doubts the *Blackheath* (195 U. S., 361) raised in regard to the limitations stated in the *Plymouth* (3 Wall., 20) have been since set at rest by this Court, which has adhered to the ancient limits of the admiralty jurisdiction.

Cleveland Terminal Co. *v.* Steamship Co., 208 U. S., 315.

The *Troy*, 208 U. S., 321.

See also the *Poughkeepsie*, 162 F. R., 494.

See further—

"Admiralty Jurisdiction of Torts," by Hon. H. B. Brown.

Columbia Law Review, January, 1909.

Neither does salvage depend on the maritime character of the property assisted.

Suppose a yacht's racing spars and sails are removed from the vessel and are stored in a ware house? Or, let it be assumed that they are transported overland across the continent? Although their connection with the yacht is only temporarily severed, they are not thereby subject to inland salvage.

Even if a small sailboat were dismantled and the hull itself hoisted on wheels and then conveyed inland, it would not carry with it the incidents of maritime salvage when it left the sea.

Suppose a cargo landed from a ship takes fire on a pier after discharge, but before it has been delivered? Such merchandise is still subject to the admiralty jurisdiction to enforce liens for unpaid freight or other indebtedness to the carrier.

Yet no Court has ever awarded salvage for extinguishing such a fire threatening goods already landed!

Indeed, if these libellants are entitled to salvage, so also would every landsman be entitled, in a greater or less degree, to salvage for anything done to put out this fire, on or about the *Jefferson!*

Salvage depends partly on the subject matter, which must be maritime.

But beyond this, no lien or basis of an admiralty award exists, unless the property be threatened by the perils peculiar to the seas, from which it is rescued by the salvors.

E.—THE LIMITS OF SALVAGE JURISDICTION, SO CAREFULLY STATED BY THE COURTS AND TEXT WRITERS, ARE DERIVED FROM THE LIMITS OF THE MORE ANCIENT RIGHTS TO WRECKS AND TO PROPERTY CAST ASHORE BY THE SEA.

The barbarous and inhuman rights over wrecks asserted in the middle ages were but a legalized piracy. Publicists continued to denounce them.

Grotius declared such laws which then confiscated goods shipwrecked (*bona naufragorum*) to be a great injustice (*plane injustas*).

War & Peace, Book 1, Chap. 7, Art. 1.

He particularized the nations which had such laws. They were the Bretons, English, Sicilians, Greeks and Danes. There was also an early conflict between such feudal customs and the ancient maritime codes which denounced severe penalties against pillaging wrecks. As, however, such salvors often had saved property from destruction, it was found just, as well as expedient, to recognize and remunerate such salvage services.

As a French Commentator says:

"Mais il fallait à la fois proscrire le vol et convier les habitants des côtes à secourir les naufragés: il etail sage de proscrire le droit de naufrage; mieux valait encore le remplacer par un droit de sauvetage. Les rôles d'Oléron, tout en édictant des peines terribles contre des pillards (arts. 36 et 38) ardonnent de 'remunerer les salveurs selon Dieu et raison el conscience et leur estat et selon que justice ordonnera' (art. 36). Des cette époque on se demande si la promesse faite en cas de péril est obligatoire, et la question est resolue négativement."

But it was continually necessary to proscribe the thief, and to invite the people on the coast to succor the shipwrecked. It was wise to forbid the right to wreck; it was more effective to replace it by a right to salvage. The laws of Oleron along with declaring terrible penalties against pillagers (arts. 36, 38) direct 'to remunerate the salvors, according to God, reason, conscience and their estate, and according to what justice shall order' (art. 36). From that epoch it was asked if a promise made in case of peril was binding, and the question is answered in the negative.

Desjardins, Traité de Droit Com. Maritime, vol. 1, p. 188.

In the edition of the Laws of Oleron published in Peters Admiralty reports, the text is different, but this provision is found there in Art. 29 (1 Peters Adm., appdix. xlvii). In the mediæval codes a system of salvage remuneration was drawn up in detail, making a distinction between property found floating at sea and property shipwrecked on land.

Thus the Consulate of the Sea, Art. 207, provides for a moiety for finding goods in a roadstead on a

beach, or floating in the water or which are cast on the land, "provided the sea shall have cast them up," and a somewhat different method of reward for goods found in a gulf or in the open sea.

Black Book of the Admiralty, Vol. III, pp. 440, 441.

The French Ordinance Marine of 1681 allowed one-third to salvors finding property at sea or on the bottom. Book iv, title ix, art. 27.

2 Valin Com., p. 635.

See also—

Abbott Law of Mer. Shipping, Part VI, Chap. II, pp. 536, 537, 12th edition.

Abbott there refers to the earlier abuse by wreckers:

"The legislators of all civilized and commercial states in modern times have laboured earnestly to repress by due severity of punishment the barbarous spirit of plundering the helpless and distressed mariner whose situation calls for assistance and relief" p. 537 (12th edn.).

An interesting survey of the early and savage seigniorial rights to appropriate wreckage, and the emergence therefrom of an ordered and regulated system of salvage is given in Jacobsen's Sea Laws, Book IV., Chap. IV.*

These authorities clearly show the origin of salvage compensation. The present bounty takes the place of an earlier spoliation. The provisions awarding salvage have been based on the property which comes within the limits of wreck claims. From this, by a natural growth and enlargement, have come compensations for assisting all property in

*The attempts in France to delimit this feudal privilege are suggestive. In the time of Louis XIV the lord of the soil had a right to appropriate goods cast up by the sea, which authority extended seaward as far as a man on horseback could reach with a lance!

Jacobsen's Sea Laws, Frick Trans., p, 526.

peril at sea, which has widened until it reaches vessels but slightly disabled, or even only needing additional hands, or requiring towage to accelerate steam vessels which lose but part of their propelling power.

The allusion to this origin of salvage often appears in the decisions. Thus, Judge Hopkinson said:

"We must not teach a salvor that he may stand ready to devour *what the ocean may spare;* he must not be permitted to believe that he brings in a prize of war and not a friend in distress."

Hand *v.* The *Elvira*, Gilp., 60; F. C. 6065.

F.—In the absence of sea perils, claims for salvage rewards are against public policy.

The common law of this country gives no compensation for services rendered on land without request. However meritorious such aid may be, no liability is imposed where the services were unasked.

The admiralty principle of awarding to the salvors parts of the assisted property is exceptional, and is justified only by the perils of navigation, and the policy of preserving property at sea and shipwrecked. It cannot be extended to land service without encroaching on principles deeply imbedded in the Anglo-American legal system.

Indeed to do so would reflect on our humanity and enlightened ideals of civil duty to fellow-sufferers in distress.

Could a body of neighbors who ran to a burning house, and put out the fire, thereafter coolly ask a court to give them some portion of the furniture and fixtures they had preserved?

To sanction such a demand would be intolerable and offensive to modern civilization.

See also the German commentator, Burchard, on this topic, cited at p. 14.

The barrier surrounding and limiting civil salvage is not narrow and artificial. It is a distinction justified only because of the perils of the sea and the relief of persons and property shipwrecked.

Its duties and remedies cannot be applied to cases on land, however meritorious.

The tendency of later cases is not to enlarge, but rather to restrict the subject of salvage.

The *Gas Float Whitton No. 2* [1897] App. Cas., 337.

Cope *vs.* Vallette Dry Dock, 119 U. S., 625.

Hughes, Handbook of Admiralty, p. 129.

G.—THE ADJUDGED CASES DO NOT AID LIBELLANTS.

No doubt parallel instances have often arisen. Yet we have no precedents for applying sea salvage to fires on land.

The courts of the United States do not treat property on land as exempt from salvage. They refer that question to the criterion of the peril—whether of the sea or by the land—and recognize the relief of wrecked property as meritorious salvage only when it has been a case of wreck by sea.

Instances of steamtugs pumping on land fires are of frequent occurrence, but the courts have never treated such cases as having the elements of salvage.

Inland fire salvage seems unknown.

The adjudged cases sustain the admiralty in following marine property to the land for the purpose of restitution, or to regain possession, even if carried ashore and sold (American Ins. Co. *v.* Canter, 1 Peters, 511) and sustain acts of Congress punishing thefts of goods taken from wrecked vessels, though committed above high-water mark (U. S. *vs.* Coombs, 12 Peters, 72).

Many English authorities also deal with conflicting rights to salvage as against claims to "wrecks of the sea" by royal franchise, but these all deal

with property actually stranded, shipwrecked or derelict, from sea perils.

Suits for shipowners against the owners of dry docks for injuries while on the dock, depend also on contract duties which are maritime.

The *Sappho*, 44 F. R., 359.

Wartman *v.* Griffiths, 3 Blatch., 528; but see The *Professor Morse*, 23 F. R., 803.

III.—THE APPEAL SHOULD BE DISMISSED, OR IF IT LIES, THEN THE DECREE OF THE LOWER COURT SHOULD BE AFFIRMED.

WALTER H. TAYLOR,
HARRINGTON PUTNAM,
Advocates for the Old Dominion Steamship Co., owner of the *Jefferson*,
Claimant-Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1908.

No. 517.

E. W. SIMMONS, LATE MASTER OF THE TUG "HELEN," AND OTHERS, Appellants.

vs.

THE STEAMSHIP "JEFFERSON," THE OLD DOMINION STEAMSHIP COMPANY, Claimant and Owner.

BRIEF FOR APPELLANTS.

THE MOTION TO DISMISS.

This cause comes on an appeal direct to this Court from the final decree of the United States District Court for the Eastern District of Virginia, which shows upon its face a decision upon a question of jurisdiction alone. Appellee now moves to dismiss the appeal, contending that it is not properly here and not within the jurisdiction of this Court because, it is said, the jurisdiction of the court below was not in issue, and also because no question of jurisdiction was certified by the court below.

THIS APPEAL PROPERLY COMES BEFORE THIS COURT.

Section 5 of the Judiciary Act of March 3, 1891, provides that appeals may be taken from the District Courts direct to the Supreme Court.

> "In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." 26 Stat. 826.

The District Court decided that it, as a Federal Court, had no jurisdiction over the cause of action set up in the libel. This appears from the very language of the decree itself.

DECREE.

> "This cause came on to be heard upon the libel of E. W. Simmons, on behalf of himself and others and the petition of Chas. H. Ashbury and others and the exceptions to the libel and petition, and having been argued by the proctors for the respective parties and due deliberation had in the premises, the Court is of opinion for reasons stated in its opinion filed the 14th day of January, 1908, that it is without jurisdiction in the premises and that the exceptions should be sustained and the libel dismissed.
>
> It is therefore ordered, adjudged and decreed by the Court, that the libel and petition herein be and the same are hereby dismissed.
>
> It is further ordered, adjudged and decreed that the claimant recover its costs herein taxed.
>
> "Dated the 29th day of January, 1908."

Appellee contends that no question of jurisdiction is

involved in this decision and that this Court had no jurisdiction to review it. In the case of "The Alliance," 70 Fed. 276, the Court said:

> "The Court below treated this matter as a jurisdictional one. That was the view presented in the petition of the claimant and, whatever our views about the issue presented may be, we think there are nothing but jurisdictional questions in the Record."

It is not material whether the appellee thinks that the question of jurisdiction ought or ought not to have been in issue; the fact is that if it was never in issue before, the decision of the District Court, by the very terms of the Final Decree put it in issue. As was said by Mr. Justice Brewer in Shields v. Coleman, 157 U. S., 176.

> "This Court will not of itself search, nor follow counsel in their search, of the Record to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction, but the Record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction. And that is here shown."

APPELLEE'S AUTHORITIES.

The cases cited and quoted by appellee, namely: World's Columbian Expo. Case, 50 Fed. 666; Louisville Trust Co. v. Knott, 191 U. S. 225. Smith v. McKay, 161 U. S. 358; Maynard v. Hecht, 151 U. S. 324; etc., are not in point, for each case merely decides whether the bill therein entitles complainant to equitable relief. Now it does not follow that because a bill fails to show grounds or equitable relief, that the complainant is denied all recourse to the Courts of the United

States. No, because he may have a perfect right to prosecute his cause in the law side thereof. But where all right to be heard in a Federal Court, whether at law, in equity or in admirality is denied for the reason that the Court will not take jurisdiction over the cause, then the Statute intends that the party aggrieved shall have recourse to this Court on the question of his right to prosecute his cause in a Federal Forum.

In the case at bar the libellants are not told merely that they have brought their suit in the wrong side of the Federal Court, or that their libel is technically defective; they are told that the Federal Court as such has no jurisdiction whatever over the cause of action alleged in their libel. Clearly then, the libellants, the appellants, are entitled to have this question passed upon by this Court.

While appellee's position on this point is far from clear, it seems also to be contended that the question involved in this appeal is not the *kind* of jurisdictional question that should have been certified to this Court for its decision. Yet in the case of "The Alliance," (Supra) 70 Fed. 273, where a libel to enforce a maritime lien against a vessel was dismissed upon the ground that as the vessel was in possession of an assignee for creditors under a state statute the Court had no jurisdiction, it was held that an appeal did not lie to the Circuit Court of Appeals but should have been taken directly to this Court.

Moreover, in Cope v. Vallette Dry Dock Co., 119 U. S. 625-627, cited by appellee, where a floating dry dock was libelled for salvage and the District Court dismissed the libel upon a plea to the jurisdiction, this Court held that the action of the District Court was correct in that particular. While this case was decided previously to the Act of March 5th, 1891, it nevertheless is in point in showing that the ques-

tion of the existence of a salvage lien is regarded by this Court as a purely jurisdictional question. At any rate, it is clear that the question of the existence of a lien for salvage, whatever else it may involve is so far dependent upon the element of locality that the two cannot be separated. (See U. S v. Coombs, 12 Peters, 72). The District Court, therefore, rightly considered that its decision in the case at bar put in issue the question of the very jurisdiction of the Court.

THE QUESTION OF JURISDICTION IS PROPERLY CERTIFIED.

The final decree of the District Court dismissing the libel in this cause decides, as we have seen above, the one single matter, namely: "That it is without jurisdiction in the premises," and this Final Decree is itself sufficient as a certificate of the question of jurisdiction. In Shields v. Coleman, 157, U. S. 176, the Court said:

> "It is not necessary that the word certificate be formally used. It is sufficient if there is a plain declaration that the single matter, which is by the Record sent up for decision, is a question of jurisdiction, etc."

Again, in the case of Interior Construction Co. v. Gibney 160 U. S. 217, the Court says:

> "The Record shows that the only matter tried and decided in the Circuit Court was a demurrer to the plea of the jurisdiction; and the petition upon which the writ of error was allowed asked only for the review of the judgment that the Court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified."

This decision is directly applicable to the case at bar. So also are the following:

Chappel v. U. S., 160, 499. (Re-affirmed in Merritt v. Bowdoin College, 167 U. S. 745.)

Filhoil v. Tawney, 194, U. S. 356.

Petri v. Creelman, etc. 199 U. S. 487.

In Excelsior, etc., Co. v. Pacific Bridge Co., 185 U. S., 282-4 the Court said:

> "As the appeal was taken directly to this Court, it must appear, under the fifth section of the Court of Appeals act, either that the question of jurisdiction was certified to this court, or that the *decree appealed from shows upon its face that the sole question decided was one of jurisdiction.* Plaintiff evidently supposed that the case was a proper one to carry to the Court of Appeals, but its appeal, having been there dismissed, it took this appeal May 27, 1901, from the original decree of the Circuit Court made November 5, 1900. This decree, after reciting 'that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction.' An appeal was taken from this decree and the order allowing the appeal states that the appeal was allowed 'from the final order and decree dismissing said suit for want of jurisdiction.' This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that Court."

THE PROPRIETY OF THE APPEAL TO THIS COURT.

The question of jurisdiction having been sufficiently and properly certified by the final decree of the District Court, whether or not it should have done so, the course of the appeal of the parties aggrieved by this decision lay only to this Court. The Circuit Court of Appeals has no jurisdiction to review a judgment of the Circuit and District Court which sustains objections to its jurisdiction *and on that ground dismisses the suit.* In Excelsior Co. v. Pacific Bridge Co., 109 Fed., 497, the Court said in dismissing the appeal:

> "There has been no decision of any question in the case except the question of jurisdiction. The Act creating the Circuit Courts of Appeal does not give them jurisdiction to review a judgment of a Circuit Court which sustains objections to its jurisdiction and on that ground dismisses the suit. The question which is before us is not affected by the fact that the Circuit Court at the time of ordering such dismissal had before it other motions and questions which, for the reason that it denied its own jurisdiction, it never decided."

And where a libel to enforce a maritime lien against a vessel was dismissed upon the ground that as the vessel was in possession of an assignee for creditors under the State Statutes the Court had no jurisdiction, an appeal from such decision will not lie to the Circuit Court of Appeals. "The Alliance," 70 Fed., 273, (Supra). The Court said that the Circuit Courts of Appeal have no jurisdiction to entertain an appeal in which the only question at issue is as to the jurisdiction of the Court below over the cause. See also—

Dudley v. Lake County, 103 Fed., 209.

Sun Printing Co. v. Edwards, 121 Fed., 826.
etc.

If libellee contends that the District Court should not have dismissed the libel herein for the lack of jurisdiction, but perhaps should have dismissed it for some other reason, then it would seem to be agreed that this appeal, involving only the question of jurisdiction, ought to be decided in favor of the appellants and the cause remanded for further proceedings.

Now, if the appellants were precluded by the terms of this final decree from appealing to the Circuit Court of Appeals, it follows, *ex natura rei*, that the decision of the District Court, thus putting in issue such a question of jurisdiction, entitled the libellants to be heard in this Court. If any other construction be placed upon the statute, then the appellants, by the mere mistake or, perhaps, caprice, of a District Judge, might be denied an appeal to any Court. For if a District Judge see fit to recite in the Final Decree in a cause that his decision therein rests on a jurisdictional question, when in fact no such question is involved, he would thereby prevent an appeal being taken to this Court, according to appellee's contention, and yet the party aggrieved could get no standing in the Circuit Court of Appeals because only a question of jurisdiction was decided and certified. Thus it would be within the power of a District Judge to make the District Court the court of last resort.

The proper rule then, seems to be that where it appears from the Final Decree of a District Court that only a question of jurisdiction is decided and certified, if such decision be wrong, and if the Court in fact has jurisdiction, then the decision on the appeal to this Court where only the question

of jurisdiction is involved must be in favor of the appellants or the party affirming the jurisdiction of the Court. The decree of the District Court in the case at bar must, therefore, be reversed.

APPEAL TAKEN WITHIN THE PROPER TIME.

While again it is by no means clear what is intended, appellee seems to contend that this appeal was taken too late. (Appellee's Brief, p. 6). We have seen above that the final decree in this case was in itself a sufficient certificate. The certificate then, being in and a part of the final decree, it would seem to be obvious that the certificate was granted "during the term during which the decree was entered." As was said in Excelsior etc. Co. v. Pacific Bridge Co., supra.

> "The case being thus in proper condition for appeal, such appeal could be taken at any time within two years. Allen v. Southern Pacific Railroad Co., 173 U. S. 479. Holt v. Ind. Mfg. Co., 176 U. S. 68."

The date of the Final Decree was January 29th, 1908. (Record p. 10). The appeal was allowed and taken July 15th, 1908. That this was within the two years allowed by the statute and therefore within the proper time, seems to be too plain for argument. See Act of June 1, 1872, 17 Stat. 196.

THE MOTION TO DISMISS THIS APPEAL SHOULD THEREFORE BE OVER-RULED.

THE QUESTION OF SALVAGE.

The Steamship Jefferson, a large ocean going vessel nev-

er used or intended to be used in any other way or in any other way or in any other business than as a ship engaged in maritime commerce, being temporarily in dry dock, was saved from fire by the valiant and heroic efforts of the crews of certain tugs operating in and from navigable waters on Christmas morning, 1906. The exceptions raise the question of admiralty jurisdiction, it being contended by the appellee that a vessel temporarily in dry dock is as to salvage *ipso facto* removed from admiralty jurisdiction, because she is not then in navigable waters or engaged in maritime commerce.

ADMIRALTY JURISDICTION OVER A VESSEL IN DRY DOCK.

The brief of the learned advocates for the appellee is not clear as to when this vessel according to their contention ceased to be within this jurisdiction.

The Jefferson was undoubtedly, prior to being docked and while plying the ocean, within admiralty jurisdiction. If being placed in dry dock removed her from that jurisdiction, when was this removal from the jurisdiction complete? Unquestionably in a sense she ceased to be engaged in maritime commerce when her last cargo had been discharged, and she started for the dry dock. Was she then removed, being still afloat, but only for the purpose of getting into the dock? Did the jurisdiction cease when she floated into the dock, and the gates were closed, or when the pumping of the water from the dock began, or when just enough water had been pumped out of the dock to let her touch bottom? All the water is never out of a dry dock. Surely it is not contended that the jurisdiction depends upon the depth of the water in the dock?

The jurisdiction depends not upon whether the vessel is actually afloat or actually engaged in navigation, but rather upon the purposes for which she was used and intended to be used. This view was taken by the learned District Judge in the salvage case of "The Old Natchez," 9 Fed. 476. affirmed upon appeal, the idea being expressed in these words:

> "The liability depends upon the use then being made, or intended to be made of the vessel or other article and not upon the mere fact that it is at the time afloat."

A dry dock is a necessary incident to maritime commerce. As necessary to the continued use of a vessel in such commerce as sails or steam. Their bottoms have to be scraped and repaired in order that they may perform their functions, a service which may have to be rendered before reaching the destined port with cargo. We can see no stronger reason why a vessel temporarily in dry dock to be repaired in order that she may continue her voyage should be considered as not engaged in maritime commerce, and not within admiralty jurisdiction, than would apply to the case of a vessel lying at a pier taking on coal. In both cases they are merely doing that which is necessary for a continuation of their maritime commerce.

ADMIRALTY JURISDICTION OVER A DRY DOCK AS A LOCALITY.

In the case of Nelson et al. v. Leland et al., 22 How. 18, it was decided that where a river or locality was navigable at times the fact that at other times it became and was unnavigable did not deprive the courts of admiralty of their

jurisdiction over it as a locality. It cannot be denied that a dry dock is also a locality which is navigable at times. Moreover it is within the ebb and flow of tidewater at such times. How, then can it be said that the dry dock was not within the admiralty jurisdiction?

In the case of Perry v. Haines, 191 U. S., 17, though not a suit for salvage but for repairs, the subject of dry docks is discussed at some length by Brown J. who held that while a dry dock itself was not a subject of salvage, (as had been decided in Cope v. Vallette Dry Dock Co., 119 U. S. 625), that this was because the dry dock itself was not used for purposes of navigation. The conclusion to be drawn from the language and reasoning of Justice Brown delivering the opinion of the Court—pp. 33-34, is that while the dry dock itself is not a subjejct of salvage, a vessel in dry dock would be. The learned Justice used this language:

> "A further suggestion, however, is made that the contract in this case was not only made on land, but was to be performed on land, and was, in fact, performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in dry dock are made upon land. We are unwilling to admit this proposition. * * *
>
> A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock.....but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land."

AUTHORITIES RELIED ON BY APPELLEE.

The case of Cope v. Vallette Dry Dock Co., is readily distinguished. It is clear that a dry dock itself as a structure is not a subject of salvage, because it is not designed for navigation or maritime commerce. It is not a 'vessel.' Neither is the land itself upon which a vessel may be wrecked a subject of salvage, though the wrecked vessel which is upon the land unquestionably is.

The case of The Warfield, 120 Fed., 847, cited in Appellee's Brief, (p. 8.), was decided by the District Court for the Eastern District of New York on January 24, 1903, while the case of Perry v. Haines, above cited, was decided by the Supreme Court, October 26, 1903. The former case was very briefly treated, and in the light of the elaborate consideration of the subject subsequently given by the Supreme Court in the latter, it is a matter of some surprise that the learned advocates for the appellee should have cited it even as a persuasive authority to sustain their contention. It is also hard to see how the remarks of ancient text writers can be regarded as having been made with reference to a modern dry dock or modern conditions.

APPELLEE'S ARGUMENT UNSOUND.

There is no analogy between the case when "a yacht's racing spars are removed from a vessel and are stored in a warehouse," and the case at bar. As Justice Brown says in the Perry v. Haines Case:

> "Articles removed from a vessel and repaired or renovated upon land at the shop of the artisan, stand upon quite a different footing from repairs made upon the vessel herself."

The same rule would apply to a claim for salvage. But it is contended by the learned advocates for the libellee that while a vessel in dry dock may be a subject of admiralty jurisdiction as to *repairs* made upon it, there is no jurisdiction in admiralty in a case of salvage claimed against a vessel similarly situated. They say that the jurisdiction in the one case is not dependent upon locality, while in the others it is. Justice Brown did not so treat the matter in the case above cited. (Perry v. Haines), but claimed that the jurisdiction for repairs existed because a vessel in dry dock was not upon land, saying that:

> "Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented, as to which we express no opinion."

Thus it would seem that the jurisdiction in that case was determined by the locality rather than by the character of the contract.

LIENS UPON VESSELS IN DRY DOCK.

If a dry dock is to be regarded as land, as to vessels there temporarily for repairs, admiralty jurisdiction *in rem* cannot attach for any purpose whether it be for tort, contract or salvage, because, as appellee contends, admiralty has no such jurisdiction over property upon land except in the case of wrecks cast upon the shore. But the decided cases hold that Admiralty has jurisdiction in cases of marine torts and contracts in dry docks.

Simpsons Pat. Dry Dock Co. v. Atlantic & E. S. S. Co., 108 Fed., 425.

Brooklyn W. F. W. v. The Sapho, 44 Fed. 359.

Haffner v. Crane, 115 Fed. 404.

In United States v. Coombs, 12 Peters, 72, Justice Story said:

> "In cases purely dependent upon the locality of the act done, the admiralty jurisdiction is limited to the sea and to the tidewater so far as the tide flows. Mixed cases may arise and often do arise where the act and services done are of a mixed nature, as where salvage services are performed, partly on tidewater and partly on shore, for the preservation of the property; in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage."

Hence it follows that the distinction sought to be drawn against the salvage claim in this case is untenable unless it is based upon the supposition that the peril of fire to a vessel is not such a peril as entitles her rescuers to salvage.

PERILS OF THE SEA.

The contention that the fire from which the vessel was saved was not a peril of the sea is not borne out either by principle or precedent.

Many perils are common to both elements, and fire peril is one. A peril of the sea is any peril to which a vessel may be exposed when in such places and positions as vessels engaged in maritime commerce may in the course of business be placed. A dry dock is a place constructed and intended solely for the use of vessels. It is a place to which all have to go, and the perils arising therein are peculiar to vessels.

That the fire in the case at bar originated on land does not affect the question of jurisdiction. It has been held time and again that vessels afloat saved by being towed from a fire originating on land are subjects of salvage.

The Kaiser Wilhelm der Grosse, 106 F. 963;
The John I. Brady, 109 F. 912;
The Barge No. 127, 113 F. 529;
The Old Natchez, 9 F., 476;
The Lone Star, 35 F. 793;
Grinby v. The Khio, 46 F. 207;
The Oregon, 27 F. 871;
Wilson v. Winchester, 30 F., 204.

If, then, the one test of salvage in admiralty, as appellee says (Brief; 16), is the peril threatening the property proceeded against, and from which it is rescued, in the light of these cases there can be no possible doubt as to the libellant's claim in the case at bar.

THE "PERIL" IN THIS CASE.

Suppose the tugs and their crews, instead of extinguishing the fire while the Jefferson was in the dock, had flooded the dock, thrown open the sea gates and towed her out, would that service have entitled them to salvage? Under the long and unbroken line of decisions above, holding that a vessel towed away from a dock near which a fire was raging on the land is impressed with a lien for salvage, they would be. The only difference between the supposed case and these decided cases is that in the one she is put afloat to be saved, and in the other she was already afloat when the rescue began.

In "The Ella," 48 Fed. 569, where the vessel was carried ashore 1,200 feet beyond the water's edge by an unusual

.orm and a channel was dug out by which she was brought back to the sea, it was held that this was a salvage service, although completely performed on land. (See Appellant's Brief, p. 10).

Again, in the case of "The Huntsville," 12 Fed. Cases, No. 6,916, it was held that admiralty jurisdiction extends to a salvage suit for services rendered from the land, to a vessel burning at the city's wharves, and it extends to services rendered from the land in completion of services rendered by other salvors at sea.

The case supposed above is not merely fanciful. In the case at bar, in point of fact, the sea valves were opened by the libellants and all the while that the salvage services were being rendered the large dock was being flooded so that by the time the fire on board the Jefferson was extinguished she was actually afloat in the dry dock.

It would indeed be a hardship upon the appellants to hold that, having saved the Jefferson from the threatening peril, because they did not then "consummate their rescue" by indulging in the useless and unnecessary labor of opening the sea gate and towing her out of the dry dock into the river, they are therefore not entitled to salvage.

LIBELLANTS ENTITLED TO SALVAGE.

Salvage is defined to be:

> "The reward allowed for a service rendered to marine property at risk or in distress, by those under no legal obligation to render it, which results in benefit to the property, if eventually saved." Hughes on Ad. p. 127.

The Jefferson was and is marine property. She was not removed to an unusual locality but was in a place where it

is necessary for such property to be placed from time to time in order to continue in its business of maritime commerce. She had no more ceased to be engaged in such business than any vessel lying at a pier taking on coal, for the purpose of continuing her voyage. She was no more removed from the admiralty jurisdiction than if she had been in a river which is navigable at times, although at other times unnavigable. She was saved by mariners operating from navigable waters, under fearful hardship, and upon whom there was no legal obligation to render the service.

THE MOTION TO DISMISS THIS APPEAL SHOULD BE OVER-RULED. THE DECREE OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

R. T. THORP,
HENRY BOWDEN,
Advocates.

D. LAWRENCE GRONER,
Proctor.

37

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 243.

Office Supreme Court, U. S.
FILED.
OCT 1 1908
JAMES H. McKENNEY,
Clerk.

E. W. SIMMONS, late Master and others,
Appellants,

AGAINST

The Steamship JEFFERSON. THE OLD DOMINION STEAMSHIP COMPANY, Claimant,
Appellee.

Notice of Motion.

SIRS:

Please take notice that upon the record herein a motion will be made at a session of this Court, to be held at the Capitol at Washington, D. C., on the 12th day of October, 1908, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance this cause on the docket of this Court, in conformity to Rule 32 of the Rules of the Supreme Court of the United States.

Dated September 28th, 1908.

Yours respectfully,
HARRINGTON PUTNAM,
Of Counsel for Appellee.

To Messrs. THORP & BOWDEN,
Proctors for Appellants.

Service of a copy of this notice is hereby admitted this 28th day of September, 1908.

THORP & BOWDEN,
Proctors for Appellants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. 517.

E. W. SIMMONS, late Master and others,
Appellants,
AGAINST
The Steamship JEFFERSON. THE OLD DOMINION STEAMSHIP COMPANY, Claimant,
Appellee.

Motion.

And now comes the claimant, The Old Dominion Steamship Company, and moves this Honorable Court to advance this cause on the docket of this Court, in conformity with Rule 32 of this Court, upon the ground that this appeal purports to be taken directly from the District Court of the United States for the Eastern District of Virginia to this Court, under the terms of Section 5 of the Act of March 3d, 1891 (26 Statutes, p. 826), and is therefore entitled to be advanced under Rule 32 thereof.

THE OLD DOMINION STEAMSHIP COMPANY,
By HARRINGTON PUTNAM,
Counsel.